No. 82-615

Office - Supreme Court, U.S.
FILED
SEP 22 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1982

JERSEY SANITATION CO., INC. AND
JOHN J. ALBERT, JR.,
PETITIONER

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN H. GIFIS
ALAN DEXTER BOWMAN
Attorneys for Petitioner
One Palmer Square
Princeton, New Jersey 08540
(609) 921-0335

THE SUPERIOR APPELLATE PRINTING COMPANY
P O BOX 363
CRANBURY, N.J. 08512
AREA CODE 609
443-4202

QUESTIONS PRESENTED

1. Whether petitioners' convictions are based upon conduct which is properly proscribed within the mail fraud statute. More specifically, whether the mails were used as an essential instrumentality in furtherance of a fraudulent scheme?

2. Whether the government adduced sufficient evidence to sustain petitioners' convictions of conspiracy and mail fraud?

3. Whether the court erred in assessing the entire costs of daily transcripts of trial upon petitioners where in excess of two thirds of the counts within the indictment were the subject of acquittals?

TABLE OF CONTENTS

PAGE

Questions Presented..... i

Table of Contents..... ii

Table of Authorities..... vi

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit..... 1

Opinion Below..... 2

Jurisdiction..... 2

Constitutional, Statutory and Rule Provisions Involved..... 2

Order extending time to file Petition for Certiorari..... 2

I. Statement of the Case..... 3

i. Procedural Background..... 3

ii. Introduction..... 5

iii. Pertinent Background Information..... 10

a. The Merger of J and B Disposal and Jersey Sanitation..... 10

b. The National Starch Contract Entered By Jersey Sanitation..... 11

c. The Formation Of A to Z And Its Intended Purposes..... 12

d. Petitioner Albert's Relationship with Chemical Control..... 13

TABLE OF CONTENTS (continued)

PAGE

iv. The Alleged Mail Fraud Conspiracy... 14

a. Acceptance by A to Z of National Starch Drums And The Problems It Encountered In Receiving A Registration..... 14

b. Special Waste Manifests - The Alleged Fraudulent Mailings..... 19

v. Imposition of Costs Of The Prosecution Upon Petitioners..... 21

II. The Jurisprudential Significance of the Arguments To Be Raised Before The Court..... 22

a. The Issue As To Appropriate Application of the Mail Fraud Statute..... 23

b. The Issue as to Assessment of Costs..... 26

REASONS FOR GRANTING THE WRIT..... 28

POINT I CERTIORARI SHOULD BE GRANTED TO ESTABLISH A CLEAR JURISPRUDENTIAL STANDARD RESPECTING APPLICATION OF THE MAIL FRAUD STATUTE. THAT STANDARD SHOULD BE THAT THE STATUTE DOES NOT EXTEND TO CONDUCT WHICH DOES NOT THREATEN THE INTEGRITY OF THE MAILS. ANY USAGE TO BE DEEMED CRIMINAL MUST BE IN FURTHERANCE OF A FRAUDULENT SCHEME WHICH CONTEMPLATES THE

TABLE OF CONTENTS (CONTINUED)

PAGE

MAILS AS AN ESSENTIAL INSTRUMENTALITY OF THE SCHEME. SINCE NO SUCH ESSENTIAL USAGE WAS PROVED AGAINST PETITIONERS, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THEM OF MAIL FRAUD..... 28

i. Evidentiary Insufficiency In The Context Of A Mail Fraud Prosecution..... 32

ii. General Principles Pertaining To Conspiratorial Liability..... 33

iii. Conspiratorial Liability As Predicated Upon An Agreement To Commit Mail Fraud..... 35

iv. The Decision of the District Court Respecting The Sufficiency of the Evidence which was Affirmed by the Third Circuit..... 36

A. There Was No Proof At Trial That The Manifests Underpinning Petitioner's Convictions Were An Essential Part Of A Scheme To Defraud As is Required To Activate The Mail Fraud Statute..37

B. With Respect to the Conspiracy Count, The Government Clearly Did Not Meet Its Heavier Burden Of Demonstrating An Agreement To Use The Mails To Defruad..... 47

TABLE OF CONTENTS (CONTINUED)

PAGE

C. The Government Did Not Adduce Any Evidence That Any Officer Or Agnet Of Petitioner-Corporation Jersey Sanitation Was Acting Within The Course Of His Employment Or In Furtherance Of The Business Of The Corporation In Falsifying Special Waste Manifests..... 48

POINT II CERTIORARI SHOULD BE GRANTED TO ESTABLISH RATIONAL GUIDELINES FOR IMPOSITION OF COSTS OF THE PROSECUTION AS IS PERMITTED WITHIN **28 U.S.C.A. Sec. 1920.** THE DECISION TO IMPOSE THE FULL COST OF DAILY TRANSCRIPTS ($20,178) UPON PETITIONERS IN CIRCUMSTANCES WHERE TWO THIRDS OF THE COUNTS CHARGED IN THE INDICTMENT WERE DISMISSED IS IRRATIONAL AND UNFAIR..... 53

CONCLUSION..... 56

TABLE OF AUTHORITIES

PAGE

BLUE V. UNITED STATES, 138 F.2d 351 (6 Cir. 1943)..... 36

CHEMICAL BANK V. KIMMEL, 68 F.2d 679 (D. Del. 1975)..... 53

FARMER V. ARABIAN AMERICAN OIL CO., 379 U.S. 227 (1964)..... 55

GALELLA V. ONASSIS, 487 F.2d 986 (1973)..... 53

KANN V. UNITED STATES, 323 U.S. 88 (1944)..... 24,47

PEREIRA V. UNITED STATES, 347 U.S. 1 (1953).... 36

STANDARD OIL CO. OF TEXAS V. UNITED STATES, 307 F.2d 120 (5 Cir. 1962)..... 51

UNITED STATES V. ALLIED ASPHALT PAVING CO., 451 F.Supp. 804 (N.D. Ill. 1978)..... 33

UNITED STATES V. ANGEILLI, 660 F.2d 23 (2 Cir. 1981)..... 39

UNITED STATES V. ARREDONDO-MORALES, 624 F.2d 681 (5 Cir. 1980)..... 35

UNITED STATES V. BAGNARIOL, 665 F.2d 877 (9 Cir. 1981)..... 40

UNITED STATES V. BENMUHAR, 658 F.2d 14 (1 Cir. 1981)..... 38

UNITED STATES V. BEUSCH, 596 F.2d 871 (9 Cir. 1979)..... 50

UNITED STATES V. BLEEKER, 657 (F.2d 629 (4 Cir. 1981)..... 38,43

TABLE OF AUTHORITIES (CONTINUED)

PAGE

UNITED STATES V. BONNETTE, 663 F.2d 495 (2 Cir. 1981)..... 40

UNITED STATES V. BOSBY, 675 F.2d 1174 (11 Cir. 1982)..... 39

UNITED STATES V. BOTTOM, 638 F.2d 781 (5 Cir. 1981)..... 47

UNITED STATES V. BROWN, 583 F.2d 559 (3 Cir. 1978)..... 43,47

UNITED STATES V. BROWNE, 225 F.2d 751 (7 Cir. 1955)..... 33

UNITED STATES V. CARTER, 311 F.2d 934 (6 Cir. 1963)..... 51

UNITED STATES V. CEDERQUIST, 641 F.2d 1347 (9 Cir. 1981)..... 46

UNITED STATES V. DeMAURO, 581 F.2d 50 (2 Cir. 1978)..... 50

UNITED STATES V. DONAHUE, 539 F.2d 1131 (8 Cir. 1976)..... 35,36,48

UNITED STATES V. GALLOWAY, 664 F.2d 161 (7 Cir. 1981)..... 39

UNITED STATES V. GRANDE, 620 F.2d 1026 (4 Cir. 1980)..... 25

UNITED STATES V. HABEL, 613 F.2d 1321 (5 Cir. 1980), cert. den. 100 S.Ct. 3018 (1981).... 33

UNITED STATES V. HALBERT, 640 F.2d 1000 (9 Cir. 1981)..... 47

TABLE OF AUTHORITIES (CONTINUED)

PAGE

UNITED STATES V. HELLER, 625 F.2d 594 (5 Cir. 1980)..... 34

UNITED STATES V. HILTON HOTELS, CORP., 467 F.2d 1000 (5 Cir. 1970)..... 50

UNITED STATES V. HOPKINS, 357 F.2d 14 (6 Cir. 1966)..... 33

UNITED STATES V. JACKSON, 390 U.S. 570 (1968)... 54

UNITED STATES V. KEENAN, 657 F.2d 41 (4 Cir. 1981)..... 44

UNITED STATES V. KENT, 608 F.2d 542 (5 Cir. 1979)..... 24,33,36

UNITED STATES V. LEBOVITZ, 669 F.2d 894 (3 Cir. 1982)..... 38

UNITED STATES V. LICHENSTEIN, 610 F.2d 1272 (5 Cir. 1980)..... 34

UNITED STATES V. LITTLEFIELD, 594 F.2d 682 (8 Cir. 1979)..... 34

UNITED STATES V. MARTINO, 648 F.2d 367 (5 Cir. 1981)..... 38

UNITED STATES V. MAZE, 414 U.S. 395 (1973)..... 24

UNITED STATES V. McCARTY, 611 F.2d 220 (8 Cir. 1979)..... 34

UNITED STATES V. MICHEL, 558 F.2d 989 (5 Cir. 1979)..... 34

UNITED STATES V. MONROE, 552 F.2d 860 (9 Cir. 1977), cert. den. 431 U.S. 972 (1978)..... 34

TABLE OF AUTHORITIES (CONTINUED)

	PAGE
UNITED STATES V. MOSS, 591 F.2d 428 (8 Cir. 1979)	33
UNITED STATES V. MURR, __ F.2d __ (4 Cir. 1982)	40
UNITED STATES V. STURM, 671 F.2d 749 (3 Cir. 1982)	38
UNITED STATES V. TACKETT, 646 F.2d 1240 (8 Cir. 1981)	44
UNITED STATES V. TARNOPOL, 561 F.2d 466 (3 Cir. 1977)	41,42,43, 45
UNITED STATES V. ZICREE, 605 F.2d 1381 (5 Cir. 1979)	32

STATUTES CITED

18 U.S.C.A. Sec. 371	3,28
18 U.S.C.A. Sec. 1341	2,3,5,28
28 U.S.C.A. Sec. 1254(1)	2
28 U.S.C.A. Sec. 1920(2)	2,27,53

TABLE OF CONTENTS

APPENDIX

PAGE

APPENDIX A

SECTION 1341. FRAUDS AND SWINDLES A-1

APPENDIX B

SECTION 1920. TAXATION OF COSTS..... A-3

APPENDIX C

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI, DATED AUGUST 19, 1982 ..... A-4

APPENDIX D

JUDGMENT ORDER, DATED JUNE 29, 1982 .... A-6

In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA

v.

JERSEY SANITATION CO., INC. and
JOHN J. ALBERT, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 29, 1982.

Opinion Below

The Judgment Order of the United States Court of Appeals for the Third Circuit is appended to this Petition as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. Sec. 1254(1).

Constitutional, Statutory and Rule Provisions Involved

Petitioners seek review of issues of law arising under 18 U.S.C.A. Sec. 1341 and 28 U.S.C.A. Sec. 1920(2). They are appended to this Petition as Appendix B.

Order Extending Time To File Petition for Certorari

On August 19, 1982 Associate Justice William Brennan, Jr. entered an order extending petitioner

time to petition this Court for certiorari until September 23, 1982.

I.

Statement Of The Case

i.

Procedural Background

In January of 1981, a federal grand jury sitting in the District of New Jersey returned a 25 count indictment against petitioners Jersey Sanitation Co., Inc. and John Albert and others. Eight counts were dismissed prior to trial. The remainder of the indictment charged petitioners with: conspiracy in violation of 18 U.S.C.A. Sec. 371 (Count One) and mail fraud in violation of 18 U.S.C.A. Sections 1341 and (2) (Counts Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen and Seventeen).

Trial of the indictment commenced before the Honorable Dickinson R. Debevoise, U.S.D.J. on March 23, 1981. At the close of the government's case, the court entered judgments of acquittal on Counts

Two, Thirteen, Fourteen, Sixteen and Seventeen. On May 8, 1981, following approximately seven weeks of trial, petitioner Jersery Sanitation was convicted of Counts One (conspiracy), Seven, Eight, Nine, Ten, Eleven and Twelve (all mail fraud counts). In the redacted version of the indictment the counts under which petitioner Jersey Sanitation was convicted are Counts One, Six, Seven, Eight, Nine, Ten and Eleven. Petitioner John Albert was convicted of Counts One (conspiracy), Seven, Eight and Nine (all mail fraud counts). In the redacted version of the indictment the counts under which petitioner John Albert was convicted are Counts One, Six, Seven and Eight.

Petitioners timely filed motions for a new trial. On June 15 and 17, 1981 argument was heard on the motions for a new trial. On June 17, 1981 the district court denied relief on all grounds within the motion with the exception of claims that the government suppressed exculpatory information and that newly discovered evidence mandated a new trial. On July 21, 1981 the district court denied

the remainder of the motions.

On July 24, 1981 petitioners appeared before the district court for sentencing. With respect to petitioner Albert, the court imposed an aggregate sentence of five years imprisonment, $12,000 in fines and five years probation. Petitioner Albert was further ordered to stand committed until the $12,000 in fines are paid. The court also assessed costs in the amount of $10,089 on petitioner Albert. With respect to petitioner Jersey Sanitation, the court imposed an aggregate sentence of $16,000 in fines and assessed costs on it in the amount of $10,089.

Thereafter, notices of appeal were timely filed, in the Third Circuit Court of Appeals. On June 29, 1982 the Third Circuit affirmed the convictions as to each petitioner.

ii.

Introduction

This Petition for Certiorari is primarily predicated upon what we submit was an over-broad interpretation of 18 U.S.C.A. Sec. 1341, the federal mail

fraud statute. A proper interpretation of the statute does not encompass petitioner's conduct. Stated somewhat differently, the evidence adduced at trial did not establish any inculpation of petitioners of the sort intended by Congress. The statute was misutilized in the instant case as a means to facilitate encroachment by a federal prosecutor into an area that Congress had not yet determined to be appropriate for federal regulation, either in a criminal or civil context. Application of the statute in the instant case was unfair. Petitioners clearly could not reasonably anticipate that in the absence of a federal regulatory scheme an over-zealous United States Attorney would abusively apply an unrelated federal criminal statute to resolve a state licensing dispute.

Specifically, the federal convictions at issue herein arose out of petitioner's respective good faith participation in the liquid waste hauling and disposal industry. The particular transactions occurred during a period when the disposal of potentially hazardous liquid waste was extremely problematical. At that time, as now, the ability of industry to generate

waste ran far afield of the technological and physical capacity to dispose of the waste. And, the problem respecting disposal technology was aggravated because the issue of safe disposal gained attention long after the emphasis upon industrial productivity. Suffice it to say, as part of commercial enterprise, these petitioners undertook with wholly laudable intentions to provide a critical service to industrial waste generators.

State statutes and regulations pertaining to waste disposal, like disposal technology, were inadequate at the time when petitioners entered the industry. Indeed, these statutes were confusing and failed to adequately inform both the generators of waste and the treatment facilities of their respective legal responsibilities. Due to philosophical differences within the Federal Legislatures, no federal statutes existed. To this date, there is a division of thought respecting environmental issues. Unrestrained interest groups and proponents of industrial growth have impeded promulgation of meaningful federal legislation which may have the effect of hampering industrial

productivity. State laws pertaining to general problems were nonetheless available in this case as a means to assure that New Jersey's state governmental agencies were able to protect the interests of the public in a safe and healthy environment. In this context, it bears observation that petitioner Albert was indicted within the State system for aspects of the same transactions at issue in federal court. A state court jury acquitted petitioner. That jury obviously was of the view that civil as opposed to criminal litigation was the appropriate forum.

The present structure of the law continues to contribute to a problematical situation. This confusion invited the entry of individual into the liquid waste disposal industry who, like petitioner Albert, were well-meaning but ill-equipped to appropriately structure and operate a disposal facility. Such individuals have encountered severe problems and learned early on that the profitability of companies, which generated waste in manufacturing finished products, was much harder to achieve in the disposal industry. This reality accounts for the failure of the generators of

waste to undertake efforts to construct disposal facilities. With respect to the inadequate regulatory structure, it should also be observed that inconsistent and arbitrary enforcement of the confusing laws has further heightened the problem of waste disposal.

Technological deficiencies and equipment failures has led to a hazardous build-up of drums containing waste in various locations throughout the country. Despite the best efforts of persons in managerial positions, that problem was encountered by Chemical Control Company and A to Z Chemical Resource Recovery Company (hereinafter "A to Z"), two of the codefendants within the trial below. This buildup of drums due to the technological inability to eliminate waste as rapidly as it was generated and collected, gave rise to this mail fraud prosecution. More specifically, petitioner's convictions relate to waste generated by National Starch Company which was hauled by petitioner Jersey Sanitation to A to Z, an unregistered facility. Chemical Control was congested and could not handle additional drums. The essential basis of the mail fraud prosecution was

that the generator of the waste and a state regulatory agency may have been misinformed respecting whether the drums involved in the convictions were to be temporarily stored at A to Z.

III.

Pertinent Background Information

a. **The Merger of J and B Disposal And Jersey Sanitation.**

Petitioner John Albert became involved in the solid waste business in "approximately 1970-1971." (Tr.3626-10). At that time, Albert formed a company called "J and B Disposal" (hereinafter "J and B") with codefendant below Gene Conlon. (Tr.3626-11 to 15). J and B was licensed by the Board of Public Utilities and the New Jersey Deprtment of Environmental Protection (hereinafter "NJDEP"). The first major contract secured by J and B was collection of solid waste for the City of New Brunswick, New Jersey (Tr.3627-10 to 16). Thereafter, in 1973 J and B merged with petitioner Jersey Sanitation Company, Inc. (hereinafer "Jersey Sanitation"). (Tr.3628-1 to 25). As part of the merger, Albert received a 25% ownership

interest in Jersey Sanitation as did Conlon. (Tr.3626-3 to 6). Albert was an officer at Jersey Sanitation until approximately "six or seven months prior to trial." (Tr.3629-16 to 19). At the time of trial, Albert was essentially manager of the company. (Tr.3629-23 to 3630-25). The municipalities serviced by Jersey Sanitation included: East Brunswick, South Amboy and Franklin Township. (Tr.3631-14 to 20). Jersey Sanitation, like J and B, is licensed by the Board of Public Utilities and NJDEP. (Tr.3632-4 to 6).

b. The National Starch Contract Entered By Jersey Sanitation.

In early 1976, National Starch Company entered into a contract with Jersey Sanitation. (Tr. 1486-6 to 9). Jersey Sanitation contracted to haul refuse waste (garbage) to the Edgeboro Landfill and liquid waste to Kin-Buc Landfill, which at the time was the only approved liquid waste disposal site in New Jersey. (Tr. 1491-13 to 18). The agreement permitted either Jersey Sanitation or National Starch to terminate the contract upon 90 days written notice. (Tr.1505-7 to 10). The method of payment was that

National Starch would issue a single check to Jersey Sanitation, which would assume the responsibility to make payment to the particular landfill for its acceptance of the waste. (Tr.1508-17 to 1509-19). In the latter part of 1976, the Kin-Buc Landfill ceased operations and Jersey Sanitation advised representatives of National Starch that liquid waste would now be transported to Chemical Control. (Tr.1513-7 to 24).

c. The Formation of A to Z And Its Intended Purposes.

In June of 1977, petitioner Albert and Conlon discussed the viability of formation of a chemical resource recovery facility. As part of their study as to the feasibility of such an operation, Albert and Conlon identified a suitable parcel of land. However, prior to purchasing the property, Albert and Conlon notified NJDEP to arrange a meeting. Prior to investing money toward fruition of the plan, petitioner Albert believed it wise to ascertain whether State authorities viewed the formation of such a facility favorably. The contemplated purchase price of the parcel of land was $135,000, a substantial sum. (Tr.

3634-1 to 3636-2). Several officials within the agency viewed the property and discussed the idea with Albert and Conlon. (Tr.3636-3 to 7). Petitioner Albert explained at trial:

> We told them that we wanted to bring in waste to be reclaimed and to take the value out of it for resale value, and anything that was to be disposed of would be disposed of at another area...[Tr.3637-22 to 3638-1]

Albert further stated that various NJDEP officials retorted "[t]hey would do anything in their power to get it off the ground." (Tr.3639-6 to 7). This encouragement gave rise to formation of A to Z.

d. **Petitioner Albert's Relationship With Chemical Control.**

When the Kin-Buc disposal facility was closed by the State in late 1976, Albert took particular notice of Chemical Control. His awareness of the facility stemmed from his involvement in Jersey Sanitation's operations. As was previously noted, Jersey Sanitation hauled National Starch's liquid waste to Chemical Control. (Tr. 3668-5 to 8). Chemical Control was in financial difficulty and in need of managerial and executive personnel who might alter its bad fortune.

The then president of the company, William Carracino, had been arrested for illegal dumping. (Tr. 3669-7 to 10). Albert discussed his entry into a relationship with Chemical Control with codefendant Michael Colleton in September of 1977. (Tr. 3668-20 to 23). Colleton at the time was a high-ranking official of the company. (Tr. 4299). Thereafter, Albert became associated with the company. His major task was to generate new accounts and to organize trucking needs. (Tr. 3669-25 to 3670-3). Albert performed these duties from September 1977 until January of 1978 when his responsibilities at Jersey Sanitation became too time-consuming to permit any further involvement at Chemical Control. (Tr. 3671-6 to 3672-1).

iv.

The Alleged Mail Fraud Conspiracy

a. **Acceptance By A to Z Of National Starch Drums And The Problems It Encountered In Receiving A Registration.**

In August of 1977, petitioner Albert received a telegram from NJDEP respecting reception by A to Z of waste material. (Tr. 3640-13 to 3641-4). The telegram

threatened a fine of $3,000 per day for continued acceptance of material. (Tr. 3641-2 to 5). In response, Albert retained an attorney and met with the highest official at NJDEP, Beatrice Tylutki. (Tr. 3641-8 to 11). An engineer, hired by Albert to aid in development of A to Z, was present at the meeting. (Tr. 3643-23 to 3644-7). Ms. Tylutki and other NJDEP officials explained to the engineer the technical requirements which they believed A to Z must meet to receive the registration necessary to operation of a recovery facility. (Tr. 3644-1 to 8). During the meeting, Albert explained to Ms. Tylutki that he could not pay the mortgage and the A to Z staff unless he was able to accept drums for storage on an interim basis pending the grant of the recovery facility registration. Tylutki was sympathetic to Albert's plight. (Tr. 3659-23 to 25). Thereafter, A to Z applied for a registration. (Tr. 3647-1 to 17).

In September of 1977, while the registration was pending, A to Z commenced receipt of drums from National Starch for storage. (Tr. 3648-17 to 25). Carl

Soriano, the individual at National Starch who was responsible for waste removal was aware that the drums were being hauled by Jersey Sanitation to A to Z. (Tr. 4019-4020). The National Starch drums were previously hauled to Chemical Control.* The National Starch drums were "brought [to A to Z] by Jersey Sanitation roll-off trucks in working hours between nine and four o'clock." (Tr. 3655-22 to 24). Several NJDEP officials visited the site and observed the drums. (Tr. 3656-1 to 8).

In October of 1977, Albert received a letter from Tylutki which directed A to Z to discontinue accepting drums. (Tr. 3660-7 to 14; Cf. Tr. 2825). In the letter Tylutki noted "I realize that your waste disposal accounts are important to you due to your economic status." (Tr. 3660-8 to 11). Her concern, however, was that "accumulation of a large number of drums can cause environmental problems." (Tr. 3660-10 to 11). In

---

* We note that there was no economic loss to Chemical Control since A to Z was intended merely as a recovery facility. The waste which was without recovery value would be taken to Chemical Control for disposal.

response to the letter, Albert contacted Tylutki again to discuss the problem of storage of drums pending disposition of the registration application which A to Z previously filed. Tylutki made the concession that "as long as [A to Z] is taking [drums] only from National Starch...that would be fine." (Tr. 3661-6 to 11).

In anticipation of receiving a registration, Albert and his partner purchased used glass and rubber-lined storage tanks valued at $150,000. (Tr. 3663-1 to 6). The tanks were purchased with money borrowed from the bank. (Tr. 3663-7 to 16). Thereafter, on December 13, 1977 Albert received a cease and desist notice from NJDEP commanding that A to Z discontinue operation as a chemical resource recovery operation. (Tr. 3664-5 to 19). Contrary to the information underpinning the notice, A to Z was merely storing drums, pending disposal at Chemical Control. There were no recovery activities occurring at A to Z. (Tr. 3664-21). The notice also requested additional design information. (Tr. 3664-22 to 3665-1). On January 13, 1979 a meeting was held to discuss

the notice. (Tr. 3665-8 to 10). At the meeting, the A to Z engineer was informed of additional information which would be required by NJDEP. (Tr. 3666-1 to 13). Albert developed the feeling that NJDEP officials were acting arbitrarily and "no way were they going to issue the registration." (Tr. 3666-2 to 13). Albert was also informed at the meeting that A to Z could no longer accept drums from National Starch for processing. (Tr. 3667-1 to 4). A to Z would be permitted, however, to store National Starch drums on a temporary basis if "Chemical Control couldn't accept them because of an overflow of drums." (Tr. 3667-10 to 19).

In July of 1978, Albert received an administrative order directing closure of A to Z. (Tr. 3681-10 to 12; Cf. Tr. 2846). Thereafter, Albert contacted representatives of National Starch and informed them that their drums would no longer be hauled to A to Z but to Chemical Control. (Tr. 3682-7 to 18). In the event that Chemical Control was unable to accept the drums due to congestion at the facility, stated Albert, A to Z would store the drums temporarily as a

convenience both to Chemical Control and National Starch. (Tr. 3682-7 to 18).

b. **Special Waste Manifests - The Alleged Fraudulent Mailings.**

NJDEP required, subsequent to May 1, 1978, that special waste manifests be prepared as part of the process of hauling, storing and disposing of wastes. (Tr. 132-10 to 14). The manifests are intended to track the progression of waste materials from the generator to the disposal facility. The form contains four parts. The generator of the waste identifies itself by placing its plant identification number in Section One of the form. The generator also indicates the date; the identity of the hauler and the identity of the destination facility. There are also spaces on the form pertaining to the nature of the waste in terms of its content and condition. Prior to hauling the waste away from the generator's premises, the hauler prepares Section Two certifying that the waste was collected. The remaining portions of the manifest accompany the shipment to the special waste facility. The hauler then signs Section Three certifying that

he has delivered the waste. An authorized individual then signs Section Four on behalf of the special waste facility certifying that it has accepted the wastes. A copy of the respective completed portions of the manifest is forwarded to NJDEP by the generator, hauler and waste facility. (Tr. 170-1 to 172-9).

Pursuant to the NJDEP regulations, special waste manifests accompanied each of the loads of wastes which Jersey Sanitation hauled from National Starch to Chemical Control or A to Z after May 1, 1978. (Tr 132). Subsequent to the July 1978 closure order issued by NJDEP to A to Z, that unregistered facility accepted National Starch drums hauled by Jersey Sanitation. The reason for storage of the drums at A to Z was the congested condition at Chemical Control. (Tr. 3691-15 to 24). Certain special waste manifests, which were mailed to NJDEP, indicated that the drums were taken to Chemical Control for disposal when, in fact, the drums were ultimately stored at A to Z pending alleviation of the congestion at Chemical Control. (Tr. 3694-21 to 25). Therein lies the exclusive

basis of the conspiracy and mail fraud prosecution.*

Petitioners Albert and Jersey Sanitation were convicted of conspiracy and mail fraud. The Third Circuit affirmed the convictions in a judgment order.

v.

Imposition Of Costs Of The Prosecution Upon Petitioners

The district court assessed costs of $10,089 each against petitioners Albert and Jersey Sanitation. The amount represents the full cost of preparation of daily copies of the transcripts ($20,178). "Daily copy was ordered pursuant to the direction of the court as necessary for the use of the court in trying complex and multi-defendant cases." (Transcript of sentence at 84-13 to 15). No costs were assessed against codefendant Conlon on the ground that he appeared to be indigent. (Transcript of Sentence at 90-16 to 18).

---

* Each of the convictions is predicated upon manifests prepared after the July 1978 closure order. Prior thereto, the manifests involving National Starch drums specifically stated that the drums were hauled to A to Z. Significantly, there was no evidence at trial that the drums were not originally taken to Chemical Control and, thereafter, moved to A to Z. Thus, to that extent there was no evidence that the manifests were, in fact, false.

Similarly, the government was not required to bear any cost although most of the counts in the indictment which it drafted were either dismissed or not guilty verdicts were returned. Specifically, petitioner Albert was acqutited of 13 of the 17 counts and petitioner Jersey Sanitation was acquitted of 10 of the 17 counts. More importantly, petitioners were not advised prior to trial that they were in jeopardy of such an assessment in the event of a conviction.

II.

The Jurisprudential Significance Of The Arguments To Be Raised Before The Court

Petitioners herein have selected two issues to be raised before this Court.* These issues relate to: (1) the inappropriate and improper application of the federal mail fraud statute to petitioners' conduct and (2) the decision of the district court to assess costs of the prosecution against petitioners. We believe that

---

* In addition to these two issues, petitioners adopt by reference the arguments raised by codefendant Eugene Conlon in a petition which he recently filed with this Court.

it is undeniable that each of these issues has national significance in the context of fair and uniform application of criminal statutes and even-handed administration of the criminal justice system. These claims are outlined below and detailed at length in the reasons for granting the writ.

a. The Issue As To Appropriate Application Of The Mail Fraud Statute.

As is demonstrated by the facts underpinning petitioners' convictions, the application of the mail fraud statute in the instant case merely served as a means to facilitate intervention by a federal prosecutor into a state licensing dispute. This statute, within the jurisprudence of each federal district, is notorious in terms of the consistent abuses of federal prosecutorial powers which it has facilitated.

It is our position that application of the mail fraud statute must be limited to conduct which threatens the integrity of the mails because the conduct converts usage of the mails into an essential instrumentality of criminal activity. Where, as here, the usage of the mail was incidental and had no

capacity to further the success of a fraudulent scheme, the United States Attorney overstepped its authority in intervening in the dispute. Simply stated, Congress did not intend that the mail fraud statute be abused as a means to facilitate disposition by a federal prosecutor of a dispute arising under State laws and regulations. The statute is properly invoked only where a usage of the mails is essential to completion of a clearly criminal scheme.

Courts in the past have undertaken efforts to limit misapplication of the mail fraud statute. In **United States v. Kent, 608 F.2d 542 (5 Cir. 1979)**, the Fifth Circuit advised the United States Attorneys of the districts within its jurisdiction that fraudulent schemes only incidentally involving the mails should be prosecuted under state laws rather than under the federal mail fraud statute. **Id. at 545. Cf. Kann v. United States, 323 U.S. 88, 95 (1944).** Similarly, in **United States v. Maze, 414 U.S. 395, 405 (1973)**, this Court stated that Congress must take the initiative if the federal government is to engage in general combat

against fraudulent schemes. Courts, stated the **Maze** Court, are not to extend the reach of the mail fraud statute. **Id.** In short, the specific thrust of the statute is upon misuse of the mails to defraud, not the regulation of state affairs. **United States v. Grande, 620 F.2d 1026, 1029 (4 Cir. 1980)** (emphasis added).

As a matter of jurisprudential necessity, this Court must issue a clear statement respecting appropriate application of the mail fraud statute. The interpretations of the statute within the various circuits, in terms of its reach, are confusing and disparate. More importantly, at this juncture the majority of circuits appear to have opted for over-broad interpretations of the statute which have provided prosecutors with unrestricted regulatory access to state affairs. Courts, prosecutors and the users of the postal system must be clearly advised as to the distinction between a usage of the mail which furthers a fraudulent scheme and a usage which is merely incidental to such a scheme. The latter usage does not threaten the integrity of the mail and

should not activate federal intervention into state matters.

b. The Issue As To Assessment Of Costs

Without pre-trial notice, petitioners at the conclusion of the district court proceedings were assessed costs of the prosecution in an amount exceeding $10,000 each. The costs were assessed for daily copies of the transcripts. Petitioners, in the absence of action by this Court, will be required to pay the cost for transcripts of the entire trial despite the fact that 23 of the 34 counts of the indictment pertaining to petitioners were the subject of acquittals. Clearly, this is not a fair result. The Third Circuit, in entering a judgment order affirming the assessment of costs in this fashion, has by its silence validated this unfair result and provided approval for such imposition in the future. In our view, the verdicts indicate that at a minimum two thirds of the government's case was without merit. Petitioners should not bear the costs of the acquittals above and beyond the substantial costs which they have paid to

attorneys for the defense conducted during the seven week trial. The precedential significance of a fair disposition by this Court would not only impact upon usage of **28 U.S.C.A. Sec. 1920(2)** but might also lead to more intelligent and careful drafting of indictments. The indictment in the instant case contained 10 counts against petitioners (5 as to each) which the district court itself was required to dismiss because the government adduced no evidence. It would, thus, appear that those counts might well have been surplusage incorporated into the indictment merely as a means to prejudice petitioners at trial.

Reasons For Granting The Writ

Point I

CERTIORARI SHOULD BE GRANTED TO ESTABLISH A CLEAR JURISPRUDENTIAL STANDARD RESPECTING APPLICATION OF THE MAIL FRAUD STATUTE. THAT STANDARD SHOULD BE THAT THE STATUTE DOES NOT EXTEND TO CONDUCT WHICH DOES NOT THREATEN THE INTEGRITY OF THE MAILS. ANY USAGE TO BE DEEMED CRIMINAL MUST BE IN FURTHERANCE OF A FRAUDULENT SCHEME WHICH CONTEMPLATES THE MAILS AS AN ESSENTIAL INSTRUMENTALITY OF THE SCHEME. SINCE NO SUCH ESSENTIAL USAGE WAS PROVED AGAINST PETITIONERS, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THEM OF MAIL FRAUD.

Petitioners John Albert and Jersey Sanitation were convicted of conspiring to devise a scheme or artifice to defraud, for the purpose of obtaining money by means of false representations, and of mailing, or causing the mailing, of documents for the specific purpose of executing the scheme. See **18 U.S.C.A. Sec. 371; 18 U.S.C.A. Sec. 1341.** The theory of the prosecution was that the object of the alleged fraudulent, conspiratorial enterprise was storage of National Starch drums at A to Z which the generator (National Starch) and NJDEP were informed had been

hauled to Chemical Control for storage pending disposal. The mailings, upon which federal jurisdiction is predicated, were special waste manifests, required to be submitted by petitioners to NJDEP, which stated that the drums were hauled by Jersey Sanitation to Chemical Control. Each of the manifests upon which the convictions were ultimately obtained relate to drums hauled to A to Z subsequent to an administrative closure order issued by NJDEP to the facility in July 1978. At the time that these manifests were mailed, NJDEP and National Starch were both aware that there was a congested circumstance at Chemical Control and that A to Z was accepting National Starch drums as a result.

It should be emphasized that NJDEP was conducting periodic inspections of the A to Z premises and was aware that the specific drums manifested for Chemical Control subsequent to July 1978, which underpinned the convictions, were being hauled to A to Z. We stress that the drums were in plain view and no attempts were made to surreptiously conceal

the drums from State officials who visited the site frequently or from anyone else. This perhaps explains the lack of a State prosecution respecting fraudulent conduct. The State prosecution of petitioner Albert pertained to maintaining a public nuisance at Chemical Control.

The essence of the problem herein was an interchange which developed respecting registration of A to Z. Pending a determination of the general jurisdiction of NJDEP over the activities at A to Z and the adequacy of the application filed for a registration, petitioner Albert and codefendant Conlon, decided to risk administratively-imposed penalties and possible prosecution by the State attorney general because of their belief in the correctness of their position. Such a decision is common in the context of ordinary business judgment. A substantial investment was made in the property and ongoing operating costs were required to be met. Disagreement with particular conduct, which is not specifically proscribed within a federal statute, is not sufficient ground to transform the mail fraud statue into a jurisdictional basis for

general regulation by a United States Attorney of matters within the State regulatory sphere.

The crux, however, of the inappropriateness of a federal mail fraud prosecution in the instant case is the utter failure of the federal government to demonstrate an essential usage of the mails to further a fraudulent scheme. Even assuming that a fraudulent scheme existed, there was no evidence that the integrity of the mails were threatened by the usage in this case. Petitioners did not utilize the mails because it would further a fraudulent scheme. In fact, the mailing of the special waste manifests was antithetical to petitioners' interest in temporary storage of drums at A to Z. The manifests alerted NJDEP that drums had been handled and activated an investigation respecting the location of the drums. In fact, NJDEP was conscientiously scrutinizing the activities of Chemical Control and A to Z, as petitioners were aware. Simply put, petitioners if given a choice would not have submitted the manifests. And, the usage of the mails were merely a convenience. The mail was not indispensable and hand-delivery of the manifests

was merely inconvenient. The integrity of the mails were not threatened to any degree. Petitioners were not a phantom company which placed fraudulent advertisements in a magazine and then accepted mail orders which were not intended to be filled. Petitioners regularly conducted business in New Jersey and lived in this State. No fraud was conceived or intended. Absent an essential usage of the mails to further a fraud, there was no basis for a federal prosecution. Since no such usage was proved in the instant case there was insufficient evidence to underpin a mail fraud prosecution.

I.

Evidentiary Insufficiency In The Context Of A Mail Fraud Prosecution

The test of sufficiency of the evidence is whether the jury might reasonably conclude that the evidence is inconsistent with the hypothesis of the defendant's innocence. **United States v. Zicree, 605 F.2d 1381, 1385 (5 Cir. 1979).** Stated somewhat differently, the government bears the burden of adducing relevant evidence from which the jury could

reasonably have found defendants guilty beyond a reasonable doubt. **United States v. Allied Asphalt Paving Co., 451 F.Supp. 804, 811 (N.D. Ill. 1978).** The two necessary elements of mail fraud, which must be proven beyond a reasonable doubt, are formation of a scheme to defraud and use of the mails for the purpose of executing the scheme. **United States v. Kent, supra at 545.** It bears emphasis that the government must prove actual mailing beyond a reasonable doubt. **Untied States v. Habel, 613 F.2d 1321, 1324 (5 Cir. 1980), cert. den. 100 S.Ct. 3018 (1981); United States v. Moss, 591 F.2d 428, 435 (8 Cir. 1979); United States v. Hopkins, 357 F.2d 14, 17 (6 Cir. 1966).** Use of the mails, not the scheme to defraud, is the **corpus delicti** of the mail fraud statute. **United States v. Browne, 225 F.2d 751, 757 (7 Cir. 1955).**

ii.

General Principles Pertaining To Conspiratorial Liability

To sustain a conspiracy conviction under federal law, there must be proof (1) of an agreement among

two or more persons, (2) to accomplish something that constitues an offense against the United States and (3) in most circumstances, an overt act by one of them in furtherance of the conspiracy. **United States v. Lichenstein, 610 F.2d 1272, 1276 (5 Cir. 1980); United States v. Michel, 558 F.2d 989, 995 (5 Cir. 1979).** Explicit in the requirement of an agreement is that each accused must be shown to have knowingly participated in the conspiracy. **United States v. Lichenstein, supra at 1276; United States v. Littlefield, 594 F.2d 682, 684 (8 Cir. 1979).** However, the government is not required to prove that the person charged participated in each aspect of the operation. **United States v. Heller, 625 F.2d 594, 598 (5 Cir. 1980).** Moreover, the government need not show that the agreement to engage in criminal activity was formal or express. An implicit or tacit agreement may be inferred from the facts and circumstances. **United States v. McCarty, 611 F.2d 220, 222 (8 Cir. 1979). United States v. Monroe, 552 F.2d 860, 862 (9 Cir. 1977), cert. den. 431 U.S. 972 (1978).** In short, a conspiracy as a crime comprehends more than mere

joint enterprise and includes other elements such as a meeting of the minds, criminal intent, and, where required by statue, an overt act in furtherance of the conspiracy. **United States v. Arredondo-Morales, 624 F.2d 681, 683 (5 Cir. 1980).**

iii.

Conspiratorial Liability As Predicated Upon An Agreement To Commit Mail Fraud

In **United States v. Donahue, 539 F.2d 1131, 1135 (8 Cir. 1976),** the Eighth Circuit stated that there is a distinction between a substantive violation of the mail fraud statute and a conspiracy to violate it. The **Donahue** Court stated:

> To start with, in order to constitute a conspiracy there must be at least two conspirators, and at least one overt act must be committed in furtherance of the conspiracy. In the second place, where a person is charged with a substantive violation of **Sec. 1341** it is not necessary for the government to prove that he intended to use the mails [the intent must be to defraud] ...use of the mails must merely be knowing and willful; it is sufficient if they were, in fact, used; but, where the charge is conspiracy...the government must also show that the

scheme contemplated the use of the medium in question. [Id.] (emphasis added).

The basis for the distinction is that conspiracy to commit a crime is a different offense from the crime which is the object of the conspiracy. **Id. Cf. Blue v. United States, 138 F.2d 351, 360 (6 Cir. 1943).** The conspiracy may be accomplished without mailing a letter. However, "the government has to sustain a heavier burden of proof as to the intent of the conspirators - not only to defraud, but also to defraud by the use of mails." **United States v. Donahue, supra at 1135; Blue v. United States, supra at 360.** (emphasis added). Succinctly stated, the basis for the offense of conspiracy to commit mail fraud is "an agreement to use the mails to defraud." **United States v. Kent, supra at 547. Cf. Pereira v. United States, 347 U.S. 1, 11 (1953).**

iv.

The Decision Of The District Court Respecting The Sufficiency Of The Evidence Which Was Affirmed By The Third Circuit

In denying petitioners' motions for a judgment of acquittal or in the alternative for a new trial,

the district court stated that "the proofs are replete with evidence of various mailings, both of special waste manifests and other documents, carried out in furtherance of the conspiracy." (Oral opinion at 13-11 to 16). The court further stated "[s]imilarly...other assertions of the absence of sufficient evidence of the elements of the crimes of which they have been guilty are without merit." (Oral opinion at 13-17 to 20). The court in its opinion ignored the fact that the acquittals were returned on the substantive counts relating to mailings other than special waste manifests prepared after the July 1978 closure order. And, more importantly, the court gave no insight as to its view respecting the essential nature of the mailings to completion of a fraudulent scheme. The Third Circuit affirmed without issuing an opinion.

A. There Was No Proof At Trial That The Manifests Underpinning Petitioner's Convictions Were An Essential Part Of A Scheme To Defraud As Is Required To Activate The Mail Fraud Statute

Unless this Court views the mail fraud statute as a prophylactic means to facilitate federal involve-

ment in nearly every business transaction, a clear statement must be issued limiting application of the statute to mailings used as an essential instrumentality in furtherance of a fraudulent scheme. The present over-broad interpretation facilitates encroachment into any context. The statute has been extended to every form of mailings without regard to its incidental as opposed to essential character. Mail fraud convictions have been upheld where a person submitted fraudulent claims to an insurance company by mail. See **United States v. Benmuhar, 658 F.2d 14 (1 Cir. 1981); United States v. Sturm, 671 F.2d 749 (3 Cir. 1982); United States v. Lebovitz, 669 F.2d 894 (3 Cir. 1982).** Moreover, in **United States v. Martino, 648 F.2d 367 (5 Cir. 1981),** the Fifth Circuit found a violation of the mail fraud statute in a case where the defendant personally hand-delivered the fraudulent insurance claim to the broker, who then mailed the claim to the insurance company. That decision was predicated upon a finding that use of the mails was foreseeable. Similarly, in **United States v. Bleeker, 657 F.2d 629 (4 Cir. 1981),**

a defendant who hand-submitted fraudulent claims to one government agency was found guilty of mail fraud when the agency mailed the claim forms to another agency for processing.

Examples of over-broad application of the mail fraud statute are available in nearly every federal circuit. In **United States v. Angeilli, 660 F.2d 23 (2 Cir. 1981)**, civil marshalls who were responsible for auctioning default debtors' property were engaged in a scheme whereby the prices were kept artifically low in return for kickbacks. A mail fraud conviction was sustained on the basis that the marshalls mailed proceed checks to the judgment creditors which did not reflect the kickbacks received by the marshalls. In **United States v. Galloway, 664 F.2d 161 (7 Cir. 1981)**, a mail fraud conviction was upheld as to an automobile wholesaler who rolled back the odometers on vehicles prior to sale to retail merchants. Titles for the vehicles were obtained by mail. The Seventh Circuit ruled that these subsequent mailings were within the statute. In **United States v. Bosby, 675 F.2d 1174 (11 Cir. 1982)** and **United**

States v. Bonnette, 663 F.2d 495 (2 Cir. 1981), mail fraud convictions were affirmed where the defendants were engaged in check-kiting schemes. The sole use of the mails occurred when the check printer mailed boxes of blank checks to the defendants subsequent to their having opened new accounts with local banks. The printed checks were not even utilized in the check-kiting scheme.

Two particularly egregious applications of the mail fraud statute are set forth in **United States v. Murr, __ F.2d __ (4 Cir. 1982)** and **United States v. Bagnariol, 665 F.2d 877 (9 Cir. 1981).** In **Murr,** a prison inmate filed a **Section 1983** action against the sheriff who affected his arrest. The complaint was mailed to the court and was accompanied by false affidavits. The mailing of the fraudulent affidavits was held to violate the mail fraud statute. In **Bagnariol,** a state legislator received a campaign contribution which he did not report to his campaign committee. Therefore, the contribution was not listed in the contribution disclosure report which the committee mailed to election authorities. The legislator's

conviction of mail fraud was affirmed.

In **United States v. Tarnopol, 561 F.2d 466 (3 Cir. 1977)**, the Third Circuit appeared to establish rational guidelines for application of the mail fraud statute to particular conduct. A reading of **Tarnopol** indicated that the Third Circuit would express some concern as to the application of the statute in the instant case. Such was not the case. Inexplicably, the Third Circuit retrenched on its holding in **Tarnopol** in affirming the conviction. **Tarnopol** involved a "payola" scheme. Inventory of a record production and distribution company, transported to it by a record manufacturer, was diverted from normal sales procedures and sold for cash. The cash was not reported on the company's books. The cash generated by the sales was intended to be used by the company to pay gratuities to disc jockeys and program directors in return for frequent airing of records and albums produced and distributed by the company. Each of the diverted shipments of records and albums was accompanied by a packing slip which was mailed to the production and distribution company by the manufacturer. In the ordinary course, the slip was forwarded to the

production company's billing department and entered into the sales journal. However, the package slips relating to shipments sold to generate cash for the "payola" scheme were not forwarded. In this way, as was previously noted, the defendants avoided entry of the money generated from sale of the merchandise onto its books. **561 F.2d supra at 468-469.** The government indicted and convicted the defendants of mail fraud because the packing slips were mailed.

On appeal, the defendants in **Tarnopol** argued that receipt of the shipping confirmations mailed in the ordinary course of business was too remote from the fraudulent schemes attributed to them to be regarded as for the purpose of executing the schemes as required by the statute. More specifically, the defendants argued that the scheme was not dependent upon the mailings and the mails played no part in bringing the alleged scheme to fruition. **561 F.2d supra at 470.** The **Tarnopol** Court agreed. The Court stated:

> [T]he gist of the crime is the use of the mails for the purpose of executing a scheme to defraud...it is not every

> use of the mails in connection with a scheme to defraud which the statute stamps as criminal but only those which are made for the purpose of executing the fraudulent scheme...In each case the question is whether or not the mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute... The close relation of the mailings to the scheme...[turns] on the dependence in some way of the completion of the scheme or the prevention of it on the mailings in question.[**[561 F.2d supra at 471-472]** (emphasis added).

Thus, the Third Circuit specifically stated that the close relationship required to be established to make out a mail fraud conviction must be one that is essential to completion of the scheme or prevention of it. **Id.**

In **United States v. Brown, 583 F.2d 559 (3 Cir. 1978)**, the Third Circuit iterated the principles articulated in **Tarnopol**. More importantly, the **Brown** Court stressed that it is analytically essential to affirmance of a mail fraud conviction that "the mailings must make apprehension of the defendants less likely than if no mailings had taken place." **Id. Cf. United States v. Blecker, 657 F.2d 629, 636 (4 Cir. 1981)** (mailings are not within the statute

if they are in conflict with the scheme); **United States v. Keenan, 657 F.2d 41, 43 (4 Cir. 1981)** (To be within the statute, mailing must not contribute to rather than prevent the detection of the scheme); **United States v. Tackett, 646 F.2d 1240, 1244 (8 Cir. 1981)** (Mailing which has no effect on the success or failure of the scheme is not within the statute).

Prior to any analysis of the character of the mailings in the instant case, it must be observed that it is difficult to conceptualize the fraudulent scheme upon which the convictions are based. Drums were temporarily stored at A to Z subsequent to the July 1978 closure order due to the congested condition of Chemical Control. Temporary storage of drums at A to Z was not within any beneficial interest of petitioners. They confronted civil and criminal penalties for temporary storage of the drums at the site. NJDEP was conducting periodic inspections and was aware of placement of the National Starch drums at A to Z despite the closure order. There was absolutely no possibility that petitioners would successfully benefit from storage of the drums at A to Z.

In this context, it is clear that the special waste manifests had no capacity to further a fraudulent scheme. **United States v. Tarnopol, supra.** The viability of A to Z as a profitable venture essentially terminated with the closure order. Petitioners were known entities within the community and had no intention to steal away in the night with illicit profits. It was plain to petitioner Albert that costly litigation of the dispute with NJDEP concerning temprary storage of drums at A to Z was forthcoming.

The special waste manifests which were monitored by NJDEP and which would be matched against drums at A to Z, had the exclusive capacity to expose petitioners as opposed to prevent detection. There were no attempts by petitioners to alter the corresponding numbers on the drums or to illegally dispose of the drums. We submit that it is clear that petitioners' conduct was the product of a desperate attempt to honor its contract to service National Starch until Chemical Control was able to alleviate its problem of drum congestion. It is particularly probative that petitioners complied with

their duty to forward the special waste manifests. Petitioners, being aware of the continuous scrutiny of its activities by NJDEP and the fact that a copy of the closure order was forwarded to National Starch, might well have decided to refuse to forward the manifests. That tact would have been indicative of a fraudulent intent. See **United States v. Cederquist, 641 F.2d 1347, 1351 (9 Cir. 1981)**. (Lack of fraudulent intent is a defense to mail fraud).

We submit that the evidence relied upon by the government failed to demonstrate either that there was an agreement to use the mails to defraud or that the mailings in this case were essential to completion of a fraudulent scheme. Thus, as the Third Circuit should have recognized, there was no evidentiary basis for either convictions of petitioners for participation in a conspiracy to commit mail fraud or of substantive commission of mail fraud. In this regard, we emphasize that the government was required to prove more than mere existence of a fraud of the sort ordinarily prosecuted in state court. The government was required to prove the existence of a sufficiently close relationship between the mailing and the fraud

necessary "to convert a state law fraud into federal mail fraud." **United States v. Brown, supra at 668. Cf. United States v. Halbert, 640 F.2d 1000, 1008-1009 (9 Cir. 1981)** (Mailings must somehow contribute to the success of the scheme); **United States v. Bottom, 638 F.2d 781, 784 (5 Cir. 1981)** (Mailings must be necessary to complete the scheme). The statute only facilitates federal intervention where the mails are rendered an instrumentality of the crime. See **Kann v. United States, 323 U.S. 88, 95 (1944).** (The federal mail fraud statute does not purport to reach all frauds, but only these limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law).

B. With Respect To The Conspiracy Count, The Government Clearly Did Not Meet Its Heavier Burden Of Demonstrating An Agreement To Use The Mails To Defraud.

It is particularly critical to evaluate separately whether the government met its heavier burden with respect to the conspiracy count. In our view,

this Court must issue an interpretation of the statute recognizing unequivocally that the government was required to demonstrate both a specific intent to defraud and an intent to utilize the mails as part of the fraud. **United States v. Donahue, supra at 1135.** With regard to the mailings in this case, petitioners mailed the manifests because of their responsibility and with the intent that the drums would be moved to Chemical Control as soon as the congestive situation abated. And, more importantly, NJDEP was aware that the drums were at A to Z. There was no intent whatsoever to defraud and clearly no specific agreement to utilize the mails for a fraudulent purpose.*

C. **The Government Did Not Adduce Any Evidence That Any Officer Or Agent Of Petitioner-Corporation Jersey Sanitation Was Acting Within The Course Of His Employment Or In Furtherance Of The Business Of The Corporation In Falsifying Special Waste Manifests.**

The government did not adduce any evidence

---

* We observe that this argument even gives the government the benefit of an assumption that the drums were taken directly to A to Z. The government did not adduce any such proof at trial. Assuming that the drums were taken to Chemical Control and later to A to Z, the manifests were not even false.

that petitioner Jersey Sanitation conspired to commit mail fraud or engaged in any conduct giving rise to the substantive counts. The liability of Jersey Sanitation was predicated exclusively on conduct engaged in by employees of the company, particularly petitioner Albert. There was no evidence that any employee acted within the course of their employment or on behalf of the corporation in falsifying special waste manifests, if indeed any such manifest was falsified. The sole legitimate inference, if any, is that petitioner Albert and codefendant Conlon may have abused their influence over company affairs. Accordingly, there was no evidence upon which petitioner Jersey Sanitation, whose major stockholders had no invovlement in these transactions, could be convicted of either conspiracy or substantive mail fraud.

A corporation is a legal entity within the law and assumes the status of "a person." Therefore, a corporation may be charged with a criminal offense. The liability of a corporation stems from the acts of its agents and officers. Any criminal act, committed

by such an officer or agent and sought to be charged against the corporation must have been done on the corporation's behalf and within the scope of the employee's authority. Moreover, the officer or agents' purpose in committing the act must have been to benefit the corporation. The purpose to benefit the corporation is decisive. Absent such a purpose, the corporation may not be convicted of an offense stemming from the act. See, **United States v. Beusch, 596 F.2d 871 (9 Cir. 1979); United States v. DeMauro, 581 F.2d 50 (2 Cir. 1978); United States v. Hilton Hotels, Corp., 467 F.2d 1000 (5 Cir. 1970).**

Where the statute requires specific wrongful intent, as in the instant matter, the corporation does not acquire that knowledge or possess the requisite state of mind essential for responsibility through the activities of an unfaithful servant whose conduct was undertaken to advance the interests of parties other than the corporate employer. Stated somewhat differently, it is essential to corporate guilt that its officers or agents' illegal conduct be related to and done within the course of such officer's or

agent's employment and have some connection with furtherance of the business of the corporation. See **United States v. Carter, 311 F.2d 934 (6 Cir. 1963); Standard Oil Co. of Texas v. United States, 307 F.2d 120 (5 Cir. 1962).**

The government failed to prove that the essential principals of petitioner Jersey Sanitation were to any degree aware of the fraudulent scheme. Therefore, the government failed to prove that the principals of the company authorized its agents to engage in it. Significantly, there was no benefit to the company in falsification of manifests by its agents. Jersey Sanitation is a legitimate business concern of longstanding which did not depend upon the hauling of hazardous wastes for its survivial. The major business of petitioner is the collection of solid waste (garbage). Incursion by the company into less lucrative endeavors by means of fraudulent practices was antithetical to the continued success of the company. The evidence indicated that unfaithful servants of the company may have engaged in these practices for wholly individual gain unbeknownst to petitioner.

It would appear that those employees stood to benefit from development of A to Z. Jersey Sanitation had no interest in that facility and was paid to deliver liquid wastes to Chemical Control. Accordingly, since the government failed to prove knowledge or benefit on petitioner Jersey Sanitation's part, all of the convictions against it must be vacated.*

---

* And, it bears repeating that there was no evidence that the manifests were false when made since there was no evidence that the National Starch drums were not initially taken to Chemical Control.

POINT II

CERTIORARI SHOULD BE GRANTED TO ESTABLISH RATIONAL GUIDELINES FOR IMPOSITION OF COSTS OF THE PROSECUTION AS IS PERMITTED WITHIN 28 U S.C.A. SEC. 1920. THE DECISION TO IMPOSE THE FULL COST OF DAILY TRANSCRIPTS ($20,178) UPON PETITIONERS IN CIRCUMSTANCES WHERE TWO THIRDS OF THE COUNTS CHARGED IN THE INDICTMENT WERE DISMISSED IS IRRATIONAL AND UNFAIR.

We acknowledge that 18 U.S.C.A. Sec. 1920(2) permits, as within the discretion of the court, recovery of the costs of transcripts "necessarily obtained for use in the case." See **Galella v. Onassis, 487 F.2d 986, 999 (1973).** To receive such costs, there must exist a demonstrable necessity for ordering the transcript "beyond mere convenience." **Id.** Where notes taken at trial would be adequate, there is no necessity for transcripts. **Chemical Bank v. Kimmel, 68 F.R.D. 679 (D.Del. 1975).** In our view, no such necessity was demonstrated below. However, that issue is not appropriate for consideration by this high court. Assuming that transcripts may have been warranted in this case, we believe that the entire costs may not be assessed upon petitioners in circumstances where the trial court and a jury

determined that the greater portion of the government's case was not proved. The government must have some incentive to confine itself to wholly honest prosecutions where the possibility of assessment of costs exists.

There are other considerations in criminal cases which militate against requiring criminal defendants to pay for transcripts which are not absolutely necessary for trial of the cause or which do not relate to offenses proved by the government. Where an attorney must inform his criminal client prior to trial that he may be required to bear the cost of several thousand dollars of transcripts, a chilling effect is placed upon the right to proceed to trial. See **United States v. Jackson, 390 U.S. 570 (1968).** In the instant case, petitioners were on trial for seven weeks at substantial expense. Most of the multi-count indictment was demonstrated to be unsustainable either by way of dismissals by the court or acquittals. Therefore, the exercise of the right to trial was clearly in good faith and with good reasons. See, **Farmer v. Arabian American Oil Co., 379**

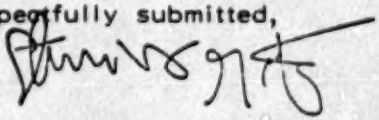
U.S. 227, 235 (1964) (Litigation costs should not be allowed which discouarge litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be).

We submit that the costs assessed against petitioners must be vacated **in toto** or some fair apportionment should be achieved by this Court. Since it would appear that a criminal defendant presently is exposed to costs if one out of one hundred counts of an indictment are proved, this Court must take some action to ensure reasonable utilization of the statute. Fair administration of the criminal justice system demands no less.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Third Circuit. That judgment should be vacated and a judgment of acquittal entered.

Respectfully submitted,



BY: _____
STEVEN H. GIFIS

BY: _____
ALAN DEXTER BOWMAN

Attorneys for Petitioner

DATED: September 20, 1982

APPENDIX A

SECTION 1341. FRAUDS AND SWINDLES

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered

by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX B

SECTION 1920. TAXATION OF COSTS

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-179

JOHN ALBERT AND
JERSEY SANITATION CO., INC.,
Petitioners,

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27, 1982

/s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 19th
day of August, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2398

United States of America,
Appellee

v.

Albert, John,
Appellant

No. 81-2399

United States of America
Appellee

v.

Conlon, Eugene, Sr.,
Appellant

No. 81-2400

United States of America,
Appellee

v.

Jersey Sanitation Company, Inc.,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 80-00380-01, 80-00380-02,
80-00380-03)

---

*Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX D

Submitted Under Third Circuit Rule
on June 24, 1982

Before: GARTH, BECKER, Circuit Judges,
and FULLAM, District Judge*

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit that (1) there was insufficient evidence to support the convictions for mail fraud and conspiracy in violation of 18 U.S.C. § 1341, 371; (2) the district court improperly instructed the jury on the questions of (a) intent to defraud, (b) the relationship between New Jersey law governing waste disposal and the federal mail fraud statute, and (c) conspiracy between a corporation and its agents; (3) the district court abused its discretion (a) in supplying the jury with written copies of the instructions, (b) in giving inadequate guidance to the jury on the question of deadlock, and (c) in failing to re-instruct the jury to deliberate only with all members present when one juror was absent

for a brief period; (4) the district court improperly admitted testimony by Daniel Piowar; (5) the district court abused its discretion in denying appellant Conlon a severance; (6) the district court improperly denied motions for a new trial or a judgment of aquittal on the basis of Brady violations and/or newly discovered evidence; (7) the district court abused its discretion in assessing against appellants Albert and Jersey Sanitation Company the cost of daily copies of transcripts, it is

ORDERED and ADJUDGED that the judgments of the district court be and are hereby affirmed.

BY THE COURT

ATTEST:

S/
Circuit Judge

S/S.M.
Sally Mrvos, Clerk

DATED: JUNE 29, 1982